

A **Lew Wai Loon v Public Prosecutor**

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO
05-52-04 OF 2012 (B)

ARIFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ
(SABAH AND SARAWAK), ABDULL HAMID EMBONG, AHMAD
MAAROP AND HASAN LAH FCJJ
10 FEBRUARY 2014

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged with drug trafficking — Whether there were serious doubts on identity of drug exhibit — Whether there were material discrepancies in evidence of relevant witnesses on gross weight of drug exhibit — Whether there was credible explanation given with regard to discrepancies — Whether there was break in chain of evidence in handling of drug exhibit — Whether lower courts misdirected themselves on law in view of Zaifull bin Mohammad v Public Prosecutor — Whether safe to uphold conviction

E When the appellant arrived in Malaysia on a flight from Yangon, he was
stopped at the customs examination counter and his bag was scanned. The scan
revealed a dark coloured image at the base of the bag. The appellant was taken
to the narcotic office where a thorough examination was carried out. In this
F examination, the police found a package that contained a white powdery
substance which a chemist later confirmed to be 3,703g of heroin. The
appellant was charged with trafficking in a dangerous drug under s 39B(1)(a) of
the DDA. Upon a maximum evaluation of the evidence adduced by the
prosecution, the trial judge found a prima facie case against the appellant. In his
G defence, the appellant testified that while he was in Yangon, he met one
'Tohfu', who had given him an empty bag to pass onto his sister in Malaysia.
The trial judge found discrepancies in the appellant's testimony and was
satisfied that the defence had not cast any reasonable doubt in the prosecution's
case. The appellant was convicted and sentenced to death. His appeal was
H dismissed by the Court of Appeal after it found that the trial judge had not
misdirected himself on the law. Hence the present appeal wherein the appellant
submitted that there were serious doubts on the identity of the drug exhibit due
to the discrepancies in the gross weight of the drugs seized. These discrepancies
arose from the evidence of the relevant prosecution witnesses, namely the
I arresting officer ('the AO'), the forensic unit officer and the chemist. Although
the forensic unit officer and the chemist had said that these differences arose
from the use of weighing scales that were not calibrated, the appellant argued
that this explanation was not good in law. The appellant relied heavily of the
Federal Court's decision in the case of *Zaifull bin Mohammad v Public
Prosecutor and another appeal* [2013] 2 MLJ 348 (*Zaifull's case*) to support his

case. The appellant also submitted that there was a break in the chain of evidence in the handling of the drug exhibit.

Held, dismissing the appeal:

- (1) An exhibit is physical or documentary evidence brought before the court. Its admission and reliability as a piece of evidence was a fact-sensitive exercise. In the present case, the discrepancies as to the weight of the drug exhibit should not ipso facto cast doubt on its identity. There were other primary factors that had to be considered such as the facts or events that formed the foundation for its admission as a piece of evidence. One such fact to be considered would be whether there was any break in the handling or custody, which would tantamount to a break in the chain of evidence. If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence. In the present case, the obvious explanation for the discrepancies in the weight of the drug exhibit as obtained by the AO, the investigation officer ('the IO') and the forensic unit officer was due to their use of uncalibrated weighing machines as compared to the weight obtained by the chemist who used a calibrated weighing machine. Although their explanation would not have been necessary, nevertheless explanation was given or could be easily inferred from their testimonies unlike in *Zaifull's* case where no explanation was available, offered or could be inferred from the facts and circumstances available. In fact in the present case, the trial judge had considered the discrepancies in the weight of the drug exhibit before he ruled that there was no break in the chain of evidence thus rendering the weight issue immaterial in coming to his decision (see paras 26–27 & 50).
- (2) In the circumstances of *Zaifull's* case, it was incumbent on the prosecution to offer some explanation for the discrepancies in the weight of the drug exhibit and 'the discrepancies left unexplained created a reasonable doubt as to the identity of the drug exhibit'. As such, under those circumstances, it was held by the Federal Court that the unexplained discrepancies had created a reasonable doubt as to the identity of the drug exhibits. Each case must be considered based on its peculiar facts and circumstances, including the facts that formed the foundation for the admission in evidence of the drug exhibits. In the present case, the appellant's plain reliance on *Zaifull's* case without more was misconceived. The unchallenged confirmation of the arresting officer that the drug exhibit was the same that he seized at KLIA should be given due consideration in determining that there was no issue of doubt in the identity of the drug exhibit. This was one of the facts that formed the foundation not only for the admission in evidence of the drug exhibit but also its reliability and trustworthiness as a piece of evidence.

A The courts below had not misdirected themselves on the law in view of *Zaifull's* case (see paras 36, 42, 51 & 54).

(3) As regards the gap periods highlighted by the appellant, the trial judge had considered and made a factual finding that there was no break in the chain of evidence. The arresting officer had marked the drug exhibit and other items seized from the appellant before handing over the same to the investigating officer. In turn the investigating officer kept the drug exhibit in a locked steel cabinet in his room and only brought it out for the purposes of fingerprint analysis and chemical analysis. Therefore the drug exhibit was within the custody and care of the investigating officer. In any case, the absence of challenge by the defence during the trial thereby depriving the prosecution of the opportunity to rebut the challenge meant that it was too late in the day for the issue to be raised at the appellate stage (see paras 52–53).

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[Bahasa Malaysia summary]

Apabila perayu tiba di Malaysia melalui penerbangan dari Yangon, dia ditahan di kaunter pemeriksaan kastam dan begnya telah diimbas. Imbasan itu menunjukkan imej berwarna hitam di bahagian bawah beg. Perayu telah dibawa ke pejabat narkotik di mana pemeriksaan teliti telah dijalankan. Dalam pemeriksaan ini, polis menjumpai satu bungkusan yang mengandungi bahan serbuk putih yang mana telah disahkan oleh ahli kimia sebagai heroin seberat 3,703g. Perayu telah dituduh kerana mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Selepas penilaian maksimum ke atas keterangan yang dikemukakan oleh pendakwaan, hakim perbicaraan mendapati kes prima facie terhadap perayu. Dalam pembelaannya, perayu telah memberi keterangan bahawa semasa di Yangon, dia berjumpa ‘Tohfu’, yang telah memberinya beg kosong untuk diserahkan kepada kakaknya di Malaysia. Hakim perbicaraan mendapati terdapat percanggahan dalam keterangan perayu dan berpuas hati bahawa pembelaan tidak menimbulkan apa-apa keraguan munasabah dalam kes pendakwaan. Perayu telah disabit dan dihukum mati. Rayuannya telah ditolak oleh Mahkamah Rayuan setelah ia mendapati bahawa hakim perbicaraan tidak salah arah dari segi undang-undang. Justeru rayuan ini di mana perayu mengemukakan bahawa terdapat keraguan serius berhubung identiti ekshibit dadah itu akibat percanggahan mengenai berat kasar dadah yang dirampas. Percanggahan yang timbul daripada keterangan saksi-saksi pendakwaan berkaitan, terutamanya pegawai tangkapan (‘PT’), pegawai unit forensik dan ahli kimia. Walaupun pegawai unit forensik dan ahli kimia telah mengatakan bahawa perbezaan ini timbul daripada penggunaan penimbang berat yang tidak ditentu ukur, perayu berhujah bahawa penjelasan ini bukan undang-undang yang baik. Perayu bergantung sepenuhnya kepada keputusan Mahkamah Persekutuan dalam kes *Zaifull bin Mohammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348 (‘kes *Zaiful*’) bagi menyokong kesnya. Perayu juga berhujah bahawa

terdapat rantaian keterangan yang terputus dalam pengendalian ekshibit dadah itu. A

Diputuskan, menolak rayuan:

- (1) Suatu ekshibit adalah keterangan fizikal atau dokumentar yang dikemukakan di hadapan mahkamah. Penerimaan dan kebolehpercayaannya sebagai keterangan adalah penelitian fakta sensitif. Dalam kes ini, percanggahan mengenai berat ekshibit dadah tidak perlu menimbulkan keraguan *ipso facto* pada identitinya. Terdapat faktor-faktor utama lain yang perlu dipertimbangkan seperti fakta-fakta atau kejadian yang membentuk asas untuk penerimaan sebagai keterangan. Salah satu fakta yang dipertimbangkan adalah sama ada terdapat pengendalian atau jagaan yang terputus, yang sama seperti rantaian keterangan yang terputus. Jika kejadian itu berlaku maka ia patut menimbulkan keraguan dalam ekshibit itu sebagai keterangan yang boleh dipercayai. Dalam kes ini, penjelasan nyata bagi percanggahan dalam berat ekshibit dadah seperti yang diperolehi oleh PT, pegawai penyiasat dan pegawai unit forensik adalah disebabkan ketika menggunakan mesin timbang yang tidak ditentu ukur berbanding berat yang diperolehi oleh ahli kimia yang menggunakan mesin berat ditentu ukur. Walaupun penjelasan mereka tidak diperlukan, namun penjelasan telah diberikan atau boleh dengan mudah disimpulkan berdasarkan keterangan mereka tidak seperti dalam kes *Zaifull* di mana tiada penjelasan boleh didapati, ditawarkan atau boleh disimpulkan daripada fakta-fakta dan keadaan yang ada. Malah dalam kes ini, hakim perbicaraan telah mempertimbangkan percanggahan berhubung berat ekshibit dadah sebelum beliau memutuskan bahawa rantaian keterangan tidak terputus dan oleh itu menyebabkan isu berat itu tidak penting dalam membuat keputusannya (lihat perenggan 26–27 & 50). B
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- (2) Dalam kes *Zaifull*, adalah wajib untuk pendakwa menawarkan apa-apa penjelasan bagi percanggahan berhubung berat ekshibit dan ‘the discrepancies left unexplained created a reasonable doubt as to the identity of the drug exhibit’. Oleh itu, di bawah keadaan tersebut, adalah diputuskan oleh Mahkamah Persekutuan bahawa percanggahan yang tidak dijelaskan telah menimbulkan keraguan munasabah mengenai identiti ekshibit dadah itu. Setiap kes perlu dipertimbangkan berdasarkan fakta dan keadaan khususnya, termasuklah fakta yang membentuk asas penerimaan keterangan berhubung ekshibit dadah itu. Dalam kes ini, kebergantungan parayu semata-mata pada kes *Zaifull* bukan suatu salah tanggapan. Pengesahan pegawai tangkapan yang tidak dicabar bahawa ekshibit dadah itu adalah sama dengan yang dirampasnya di KLIA patut diberikan pertimbangan sewajarnya dalam menentukan bahawa tiada isu keraguan mengenai identiti ekshibit dadah itu. Ini adalah salah satu daripada fakta yang membentuk asas bukan G
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- A sahaja untuk penerimaan keterangan mengenai ekshibit dadah itu tetapi juga kebergantungan dan kebolehpercayaannya sebagai keterangan. Mahkamah bawahan tidak salah arah daripada segi undang-undang berdasarkan kes *Zaifull* (lihat perenggan 36, 42, 51 & 54).
- B (3) Berhubung lompong masa yang diutarakan oleh perayu, hakim perbicaraan telah mempertimbangkannya dan membuat penemuan fakta bahawa rantaian keterangan tidak terputus. Pegawai tangkapan telah menandakan ekshibit dadah itu dan barangan lain yang dirampas daripada perayu sebelum mengemukakan yang sama kepada pegawai penyiasat. Sebaliknya pegawai penyiasat telah menyimpan ekshibit dadah itu dalam peti besi berkunci dalam biliknya dan hanya membawanya keluar bagi tujuan analisa cap jari dan analisa kimia. Oleh demikian ekshibit dadah itu dalam kawalan dan jagaan pegawai penyiasat. Dalam apa-apa keadaan, tiada cabaran daripada pembelaan semasa perbicaraan yang mana dengan itu menafikan pendakwaan peluang untuk mematahkan cabaran itu bermaksud ia sudah terlewat untuk isu tersebut ditimbulkan di peringkat rayuan (lihat perenggan 52–53).]

Notes

- E For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

- F *Butera v Director of Public Prosecutions* (1987) 62 ALJR 7, HC (refd)
Eng Sin v PP [1974] 2 MLJ 168, FC (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636; [2013] 6 CLJ 945, FC (refd)
R v Nikolovski [1996] 3 SCR 1197, SC (refd)
R v Stipendiary Magistrate at Lambeth & another, Ex parte McComb [1983] 1 All ER 321, QBD (refd)
- G *R v Uxbridge Justices, Ex parte Sofaer & another* (1986) 85 Cr App R 367 (refd)
R v Virtue [1973] 2 WLR 209, CA (refd)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)
Tan Yew Choy v PP [2010] 5 MLJ 212; [2009] 4 CLJ 245, FC (refd)
- H *Thompson v R* [1918] AC 221, HL (refd)
Zaifull bin Mohammad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383, FC (folld)

Legislation referred to

- I Dangerous Drugs Act 1952 ss 2, 39B(1)(a)

Appeal from: Criminal Appeal No B-02-203-07 of 2011 (Court of Appeal, Putrajaya)

Hisyam Teh Poh Teik (S Selvi with him) (Teh Poh Teik & Co) for the appellant.

Wan Sharuddin (Joy Jothii with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution. A

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court): B

INTRODUCTION

[1] The appellant was charged with the offence of trafficking in 2,831g of heroin, a dangerous drug under the Dangerous Drugs Act 1952 (DDA). He was arrested at Kuala Lumpur International Airport (KLIA) on 18 June 2008 at 5.45pm. C

[2] On 29 September 2011 the High Court at Shah Alam found him guilty as charged and sentenced him to death. D

[3] The Court of Appeal dismissed his appeal on 6 March 2012.

[4] The appellant is now appealing to this court on two grounds. However, at the commencement of the hearing his learned counsel indicated to the court that he would only deal with one issue, namely, the identity of the drug as alleged in the charge preferred against the appellant. He relied on the decision of this court in *Zaifull bin Mohammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; [2013] 2 CLJ 383 ('*Zaifull's case*') in preference to the recent decision of this Court in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945 ('*Hasbala's case*'). E F

[5] This judgment is therefore focused on whether the courts below had indeed misdirected themselves on the law in view of the decision in *Zaifull's case*. G

BACKGROUND FACTS

[6] In summary it was the case for the prosecution that on 18 June 2008 SP1 ('ASP Azhar Hashim') and his police party were on duty at carousel 'J' of the arrival hall of the KLIA. They were there to observe passengers arriving on flight MH 741 from Yangon, Myanmar. SP1 saw the appellant who had collected a black bag from the carousel and was dragging it towards the customs examination counter. SP1 stopped the appellant and instructed him to place the bag through the scanning machine. The scan revealed a dark coloured image at the base of the bag. As such SP1 requested the appellant to place the bag on the examination counter. The bag was zipped but not locked. On examination of the contents SP1 found inside the bag some clothing and H I

A another empty bag. The appellant was taken to the narcotic office where a thorough examination was carried out.

[7] At the narcotic office SP1 used a knife to cut open the side of the bag. There was a grey piece of hard paper. Upon cutting the surrounding of the hard paper SP1 found a yellow cello-taped package. SP1 went on to cut open the package and in it he found white powdery substance. On chemical analysis the white powdery substance was found to be heroin, a scheduled dangerous drug as defined under the DDA. Hence the appellant was charged with trafficking in a dangerous drug under s 39B(1)(a) of the DDA.

C [8] The prosecution also adduced in evidence that the clothing found inside the bag fitted the appellant and the DNA found on it matched the appellant's DNA.

D [9] Upon maximum evaluation of the evidence adduced by the prosecution the learned trial judge found a *prima facie* case against the appellant.

[10] It was the finding of the learned trial judge, *inter alia*:

E Mahkamah menyedari bahawa terdapat perbezaan jumlah berat kasar dadah yang dirampas dalam kes ini, masing-masingnya oleh SP1 (3,500g), SP3 (3703.8g), SP7 (3,505g dan SP9 (3,720g). Keterangan menunjukkan mereka menggunakan alat-alat timbang yang berbeza dan SP7 dan SP9 menyatakan alat timbang yang mereka gunakan adalah tidak dikaliberasi. Mahkamah berpuas hati rantaian kawalan barang kes dadah ini tidak terputus langsung, malah bungkusannya (P57) dicam oleh semua mereka itu.

F The Court recognises that there are discrepancies in the total gross weight of drugs seized in this case respectively by SP1 (3,500g), SP3 (3703.8g), SP7 (3,505g and SP9 (3,720g). Evidence shows that the weighing scales they used were different and SP7 and SP9 stated that the weighing scales they used were not calibrated. This Court is satisfied that the chain of custody of the drug exhibits was not broken at all, indeed the packaging (P57) was identified by all of them.

G [11] In his defence the appellant testified that he went to Yangon, Myanmar on 16 June 2008 and stayed at Panorama Hotel. He saw SD2 there to take him for tours. He had met SD2 before in May 2008. And a day after his arrival in Yangon he met a person known to him as 'Tohfu' who gave him an empty bag (P8). The appellant said that Tohfu asked him to bring the bag (P8) to Malaysia and to give it to his sister named Angie.

I [12] On 16 August 2008 he returned to Malaysia. He put inside P8 his own bag containing his clothing. On arrival at KLIA the appellant said that he was arrested. The bag (P8) that was supposed to be empty in fact contained drug (heroin) that was carefully hidden inside it.

[13] After considering his defence the learned trial judge found discrepancies in the story of the appellant. As such he did not believe it. And having considered the case as a whole the learned trial judge was satisfied that the defence did not cast any doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt. The appellant was therefore convicted and sentenced for the offence as charged.

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[14] The Court of Appeal dismissed his appeal against his conviction and sentence. In coming to their decision the learned judges of the Court of Appeal said that after going through the evidence carefully they found that the learned trial judge did not misdirect himself on the law. The sole issue before the Court of Appeal was whether the learned trial judge erred in applying the double statutory presumptions under the DDA.

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APPEAL BEFORE THIS COURT

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The contentions

[15] As indicated earlier, at the commencement of the hearing of this appeal learned counsel for the appellant decided to confine his argument on this ground, namely:

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That the prosecution cannot be said to have proven its case beyond reasonable doubt as there exists serious doubts on the identity of the drug exhibits.

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[16] Learned counsel premised his submission on the *discrepancies in the gross weights of the drug exhibits*. He highlighted that there were three different gross weights of the drug exhibit allegedly found with the appellant, namely:

- (a) the gross weight given by SP1 (ASP Azhar Hashim Ketua Bahagian Siasatan Jenayah Narkotik KLIA) in his oral evidence was 3.5kg;
- (b) the gross weight given by the Forensic Unit Officer (SP9 — Chief Inspector Mazli Jusoh) was 3,720g; and
- (c) the gross weight given by the chemist (SP3 — Maimonah Sulaiman) was 3,703.8g.

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[17] Due to the weight discrepancies learned counsel submitted that the *weight difference between SP1 and the chemist is 203.8g whilst the weight difference between SP1 and SP9 is 220g*. There is no credible explanation with regard to the discrepancies and on this point alone the case for the prosecution collapses.

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[18] He went on to say that *though both SP7 and SP9 said that the weighing*

A *scales that they used were not calibrated, this mere statement is not good in law as the prosecution must adduce scientific evidence to show that the weighing scales were not accurate: see Tan Yew Choy v Public Prosecutor [2010] 5 MLJ 212; [2009] 4 CLJ 245 ... In any event, there was no explanation from SP1. The discrepancy between the weight obtained by him and that of the chemist is huge.*

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[19] It was also submitted that there was a break in the chain of evidence in the handling of the drug exhibit. The cut was left open and there was nothing said whether the 'bungkusan' was kept in check while with the Police. There was no explanation given on the movement of the drug exhibit or where they were kept from 19 June 2008 to 24 June 2008 and from 24 June 2008 to 26 June 2008. As such the markings on the drug exhibit was not conclusive due to the huge differences in the weights given by the relevant witnesses.

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D [20] Learned counsel for the appellant relied on the decision of this court in *Zaifull's* case. He argued that *Hasbala's* case could be distinguished since there was no break in the chain of evidence in that case unlike the present case. Further, in *Hasbala's* case there was no challenge in the handling of the drug exhibit. As such the weight of drugs was immaterial.

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[21] In reply, learned deputy public prosecutor submitted that the relevant witnesses had explained the weight discrepancies of the drug exhibit unlike in *Zaifull's* case. He said that the weights given by SP1 and SP7 (Insp Mohd Firdaus bin Ali — the investigating officer) were the same. SP1 testified that he weighed the drug exhibit merely to get the estimated weight while SP7 said that he weighed them to check on the weight given by SP1. SP7 added that he used the department weighing machine but he was not sure whether it was calibrated. SP9 also weighed the drug exhibit using a weighing machine that was usually used in shops. It was not calibrated. Only SP3 used a calibrated weighing machine.

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[22] Thus, the learned deputy public prosecutor argued that the differences in the weights given was due to the types of weighing machines used by the respective witnesses. As such he submitted that there was explanation given for the weight variations.

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[23] It was also argued that the facts of *Zaifull's* case should not be compared with the present case where the drug exhibit was not in granular form. Learned deputy public prosecutor contended that the crucial issue should be whether there was a break in the chain of evidence when handling the drug exhibit.

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The analysis

Overview

[24] Now, put simply it was the contention of learned counsel for the appellant that the identity of the drug exhibit produced (P57) during the trial was in doubt. Due to the differences in the weight given by the relevant witnesses P57 could not be the same alleged drug seized by SP1.

[25] In considering the contention of learned counsel for the appellant it is essential to first appreciate that an exhibit, perceivable by the senses and as distinguished from testimony, is part and parcel of evidence adduced during a trial. (see *R v Uxbridge Justices, Ex parte Sofaer & another* (1986) 85 Cr App R 367; *Butera v Director of Public Prosecutions* (1987) 62 ALJR 7; *R v Stipendiary Magistrate at Lambeth & another, Ex parte McComb* [1983] 1 All ER 321.) It is real evidence as opposed to demonstrative or testimonial evidence. And evidence is the means by which a fact in issue is proved (see *R v Virtue* [1973] 2 WLR 209; *Thompson v R* [1918] AC 221). Further, before an exhibit is admitted into evidence the foundation for its admission must be established. Such foundation may be in the form of a fact or event that occurred and providing the reliability and trustworthiness of the exhibit as a piece of evidence (see *R v Nikolovski* [1996] 3 SCR 1197 (Canada)).

[26] In other words, an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. In short it is a fact sensitive exercise.

[27] Accordingly in the present case, we would say that discrepancies in weight alone of an exhibit such as drug should not ipso facto cast doubt on its identity. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. One fact and/or event to consider is whether there is any break in the handling or custody, which tantamount to a break in the chain of evidence. If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence. (see *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75; *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168).

The *Zaifull's* case and *Hasbala's* case

[28] In view of the heavy reliance on *Zaifull's* case by learned counsel for the

A appellant we are of the view that the pertinent facts and circumstances of that case as narrated in the judgment should be reproduced in toto and considered in this judgment. The facts read:

B On 8 December 2004, at a food stall at Simpang Empat, Kampung Delik, Klang, Chief Inspector Loi Yew Lik ('PW4') was introduced to the second appellant by his informer. The informer left the scene immediately after the introduction. In that introduction, PW4 introduced himself to the second appellant as 'Alex', a businessman running a pub in Sunway, Petaling Jaya. The second appellant introduced himself as 'Osama'.

C PW4 negotiated with the second appellant for the purchase of proscribed drugs from the second appellant. PW4 asked for 3kg of cannabis from the second appellant, but the second appellant refused to supply that amount as he was apprehensive about it, since he had never dealt with PW4 before. Instead, the second appellant offered only 1kg of cannabis to PW4. The second appellant told
D PW4 that the drug was of a high quality and fixed the price at RM2,700, which PW4 agreed. PW4 showed the money to the second appellant. However, the second appellant asked PW4 to meet him later at 7pm on the same day and place. The negotiation was conducted in Malay. Based on that negotiation, PW4 went back to his office at the Police Headquarters in Shah Alam and briefed his men. They then, arranged for an ambush to be carried out during the forthcoming meeting between
E PW4 and the second appellant.

At 6.30pm that evening, PW4 waited in his car at the agreed place. He was alone in the car. At 7pm, PW4 saw a car, a proton Iswara bearing registration No BHC 4964 approaching his car and stopped about 15 meters from where he was waiting.

F Then, the second appellant came out from the front passenger door of that car and walked towards PW4's car. The second appellant asked PW4 to get into his car to take the drug, but PW4 refused. The second appellant then went back to his car.

Two minutes later, the second appellant came out of his car and walked towards PW4's car. The second appellant got into PW4's car and told PW4 that his friend would fetch the drug while he and PW4 would wait there. PW4 agreed with that
G plan.

Later, the second appellant asked PW4 to drive to Taman Melawis in Klang, where he said his friend would deliver the drug.

H PW4 agreed and drove to that place. Near the junction heading towards Taman Melawis, PW4 stopped his car. Five minutes later, PW4 saw the same Iswara car driven by a Malay man driving slowly past his car. The second appellant asked PW4 to follow the Iswara car, which he did.

I After a while, the Iswara car stopped by the roadside. PW4 stopped his car right behind the Iswara car. The second appellant then went out from PW4's car and got into the Iswara car.

One minute later, the second appellant came out from the Iswara car and got into PW4's car. The second appellant told PW4 that his friend wanted the money to be paid first before PW4 could take delivery of the drug. PW4 did not agree to that and

told the second appellant that he wanted to see the drug first. PW4 asked the second appellant to bring the drug to him. The second appellant then told PW4 that he had personally seen the drug inside the Iswara car. The second appellant went back to the Iswara car, to take the drug.

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When the second appellant got into the Iswara car, PW4 then gave the pre-arranged signal, that is by pressing on the brake lights of his car, to the police ambush party to act. Thereupon, the police ambush party descended on the Iswara car. A police Pajero vehicle blocked the path of the Iswara car. PW4 rushed out of his car and arrested the second appellant. Chief Inspector Mohd Husni bin Manaf ('PW5') arrested the driver of the Iswara car, who was later identified as the first appellant.

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PW4 then conducted a search inside the Iswara car.

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Underneath the front passenger seat of the car, PW4 found a white plastic bag with the words 'Mobil Mart' printed on it.

Inside that bag, PW4 found a slab of compressed cannabis ('satu ketulan mampat dadah ganja') wrapped in transparent plastic and aluminum foil.

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On the back seat, PW4 found a small black bag with the words 'Bahagian Pembangunan Kesihatan Keluarga Kementerian Kesihatan'. Inside that black bag, PW4 found a small package of cannabis ('satu mampatan kecil ganja') wrapped in yellow cello tape and yellow plastic. The first and second appellants, together with the packages seized, were all brought to IPD Klang.

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Before handing over the seized items to the investigating officer, Chief Inspector Ahmad bin Mohd Rambli ('PW8'), PW4 marked those items for identification, by signing his signature and writing the date '8 December 2004' coupled with other markings.

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The seized items were sent to the government chemist for analysis. The government chemist, PW2 confirmed that they were cannabis as defined in s 2 of the DDA, having a net weight of 799.4g.

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[29] Upon the defence being called by the trial court the appellants gave their respective defences. For the first appellant his defence as reported in the judgment was this:

The first appellant denied any knowledge of the drug found in the Iswara car. He said, the Iswara car belonged to his father.

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That night, he borrowed his father's car to pick up and send the second appellant to his workplace at the Marine Department Port Klang. On their way, the second appellant received a phone call and requested to be dropped off at Simpang Empat, Kampung Delik, Klang to meet a friend.

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After dropping off the second appellant, the first appellant received a phone call from a friend by the name of Madin. Madin wanted to see the first appellant in a restaurant at Melawis, Klang. He claimed, he met Madin at the restaurant. Madin borrowed the Iswara car for about 1/2 an hour, while he waited at the restaurant.

A After Madin returned the car to him, he went off to pick up the second appellant, from where he had dropped off the second appellant earlier. But on his way, he was stopped by the second appellant who was inside PW4's car. He then stopped his car in front of PW4's car.

B Then, he saw the second appellant coming out from PW4's car and walked towards his car. The second appellant told him to wait for a while. Then, the second appellant went back to PW4's car. A short while later, the second appellant walked back to his car and got into the car.

C Once inside, the second appellant asked him to send him to his work place. When he was about to engage the car into the first gear, a Pajero jeep suddenly intercepted his path and blocked his car.

D A number of persons came out from the Pajero. They were all not wearing police uniform. The first appellant thought that they were robbers. The first and second appellants were pulled out of the car and were brought behind the car and made to sit on the road side. Then, one of the members of the raiding party, who identified himself as a police officer, told him he wanted to conduct a search. They could not see what was happening inside the car as they were sitting behind the car, facing the opposite direction. 20 minutes later, a Chinese gentleman approached the first appellant showing a package. He put that package on the roof of the car and asked the first appellant, what was in that package. The first appellant said he had no knowledge of the contents of the package. He then told the first appellant, 'Ini barang salah ...'. The first appellant was shocked and scared. He asked the police, where was the package found. The police said, it was found inside the car. They were subsequently brought to Shah Alam Police Station. Later on, the first appellant was brought to his house and a search was conducted in his house, but nothing incriminating was found.

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[30] For the second appellant his defence was this:

G The second appellant also denied any knowledge of the drug. He admitted he met PW4 on the morning and later at night on the day in question. However, at those meetings, they were merely chit-chatting about their common interest, ie, fishing while having teh tank. He denied negotiating for the sale of any drug with PW4. He said, he was introduced to PW4 by his friend Sabri at a stall.

H And on the material date, initially, he took a ride in the first appellant's car to his workplace. But on the way, Sabri called him to go over to the stall.

I The first appellant dropped him off at the stall where he met Sabri and PW4. They chit chatted about fishing. Since the first appellant did not turn up to pick him up as promised, the second appellant asked PW4 to drive him to his workplace. On the way, the first appellant called and told him that he was at Taman Melawis. Then, he saw the first appellant's car overtaking their car and stopping in front of PW4's car. He then went over to the first appellant's car to thank him, but all of a sudden, a Pajero jeep blocked the first appellant's car and arrested them.

[31] The trial judge convicted the appellants and the Court of Appeal dismissed their appeals.

[32] The appellants raised in total six grounds in his appeal to this apex court with one common ground that read: *there are serious doubts as to the identity of the drug exhibit.* A

[33] Before the trial judge the charge preferred against the two appellants read: B

Bahawa kamu bersama-sama, pada 8 Disember 2004, lebih kurang jam 7.45 petang di Jalan Emas, Taman Melawis, di dalam daerah Klang, di dalam Negeri Selangor Darul Ehsan, untuk mencapai niat bersama kamu, telah didapati memperedarkan dadah berbahaya iaitu seberat 799.4 gram Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 dibaca bersama-sama seksyen 34 Kanun Keseksaan. C

[34] However, the original charge preferred against them before the magistrate's court read: D

Bahawa kamu bersama-sama pada 8 Disember 2004 jam lebih kurang 7.45 petang, di tepi Jalan Emas, Taman Melawis, di dalam Daerah Klang, di dalam Negeri Selangor bukan seorang yang diberi Kuasa di bawah Akta Dadah Berbahaya 1952 atau mana-mana Peraturan di bawah Akta tersebut telah didapati di dalam jagaan dan kawalan kamu (6) ketulan mampatan daun kering yang disyaki Ganja 880 gram (berat kasar), oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 39 B (1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B (2) Akta yang sama (Pindaan 1986). E

[35] It was therefore not surprising when dealing with the common ground the learned Chief Justice in delivering the judgment of the court said this: F

(32) We are of the view that in present case, there exist material *discrepancies in the gross weight* of the cannabis mentioned in the *original charge compared to the evidence of PW2*. Other than that, there also exist *material discrepancy in the number of 'ketulan' mentioned in the original charge compared to the number of 'ketulan' as testified by PW4, PW8 and PW2*. *The gross weight and the number of 'ketulan' of the drug exhibit certainly go to the identity of the drug exhibit.* How else can the identity of the drug exhibit be established. Therefore, any serious discrepancies on the gross weight and the number of 'ketulan', unless satisfactorily explained, in our view will go to the question of identity of the drug exhibit. G

...

(35) With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. H

In the circumstance, the defence should not have been called at the close of the prosecution case. I

A ...

(37) ... In our view, it is a contradiction in terms, to say that there is no break in the chain of evidence, when in fact there exists material discrepancy as to the weight of the drug exhibit. In any event, in the present case the discrepancies are not only as regard to the gross weight but also as to the number of 'ketulan'. In our view, these are material discrepancies that go to the issue of identity of the drug exhibit. In the circumstances, therefore, it cannot be said that there is no break in the chain of evidence. On that premise, we hold that it would not be safe to uphold the convictions. (Emphasis added.)

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[36] We agree entirely with the proposition stated in *Zaifull's* case that ... *in the circumstance of this case*, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. (Emphasis added.)

D

[37] However, while it is advisable for the prosecution to give some explanations for the discrepancies in the description of an exhibit such as its weight, as we have said earlier, the foundation for its admission into evidence that may have a bearing on its reliability and trustworthiness as a piece of evidence should also be duly considered when determining if indeed an explanation is essential to clear any doubt that may arise as to the identity of the exhibit.

E

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[38] Thus, in *Zaifull's* case the pertinent matters taken into account were:

(a) the unexplained glaring discrepancies stated in the charges preferred before two different courts as to the weights and total number of 'ketulan' (slabs) of the drugs seized; and

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(b) the discrepancies in weights of the drugs and the total number of 'ketulan' given by PW4, PW8 and PW2 were not explained or clarified either by those witnesses or other witnesses vis-a-vis the charges preferred in the magistrate court and the trial court respectively.

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[39] Accordingly, in view of the stark unexplained discrepancies while devoid of any facts and events that led to the admission of the seized drugs as exhibits, we agree that in the circumstances of that case there was no necessity to further consider the issue of chain of evidence since the facts and circumstances were self-evident on the doubt in the identity of the drugs seized.

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[40] It was also submitted before us that the decision in *Zaifull's* case was in conflict with *Hasbala's* case, a subsequent decision of this court pertaining to the same issue of weight discrepancies of drugs seized.

[41] With respect, *Hasbala's* case had carefully considered *Zaifull's* case. From the judgment in *Hasbala's* case it was obvious that the facts and circumstances of that case set it apart from *Zaifull's* case. Further, in *Hasbala's* case the foundation for the admission in evidence of the drug seized was also duly considered. This was how the learned President of the Court of Appeal put it:

In Zaifull Muhammad, there were two material discrepancies, one as to the number of 'ketulan' and the other as to the gross-weight of the cannabis. In the original charge, it was stated the appellant was in custody of and control of six (6) 'ketulan' of cannabis, and gross weight was 880 grams. But the evidence led by the prosecution was in relation to two 'ketulan'. The police witnesses PW4 and PW8 consistently spoke of only two 'ketulan' of cannabis and no one ever mentioned six 'ketulan' as stated in the original charge. The chemist, who received the drug exhibits from PW8 also spoke of two 'ketulan' as opposed to six 'ketulan'. He found the gross-weight of the two 'ketulan' of cannabis to be 829.49 grams.

Thus, in Zaifull Muhammad the discrepancies were not only on the gross weight of the drugs exhibits but also on the number of slabs. The discrepancies were never explained by the prosecution. And it was under those circumstances that this Court held that the unexplained discrepancies had created a reasonable doubt as to the identity of the drug exhibits and the defence should have not been called at the close of the prosecution's case.

The facts and circumstances in the present case is distinguishable from Zaifull Muhammad. In the present case, while it is true that the chemist had in the chemist report stated that the five slabs of drug exhibits that she received from SP6 were wrapped in aluminum foil reinforced by adhesive tape but she corrected it while giving evidence in court by stating that the five slabs of drug exhibits were wrapped with transparent plastic. She also applied to the Court to have the Chemist Report P8 amended by substituting the word aluminum foil with transparent plastic. The amendment was allowed with no objection by the defence counsel. In this regard it is pertinent to note that the identity of the drug exhibits was never an issue before the High Court as well as the Court of Appeal. There was no challenge as to the identity of the drug exhibits by the defence.

We are of the view that, with the amendment as well as the correction made by SP3; and, in the absence of any challenge by way of cross-examination on the identity of the drug exhibits, the issue of discrepancies on the manner in which the five slabs of drug exhibits were wrapped is devoid of any merit.

Thus, the only issue left is whether the unexplained difference between the gross-weight of the drug exhibits as found by PW6 and that of PW3 is sufficient to create a reasonable doubt to the prosecution's case. On the facts and circumstances of this case, we answer the issue raised in the negative. In this case PW4, and PW6 had clearly identified the drug exhibits that were produced before the High Court. Both PW4 as well as PW6 had identified the markings that they had made on the exhibits including the date and the signatures they placed on the 5 slabs of the drug exhibits. PW3 too had identified the markings as found on the exhibits when she received it from PW6.

- A Having regard to the evidence of PW4, PW6 and PW3, learned counsel's contention that the drug exhibits produced before the High Court might not be the same as the one seized by PW4 from the appellant is, in our view, misconceived. On the evidence adduced, we are not in doubt that the drug exhibits seized and same drug exhibits that were produced before the High Court upon which the appellant was charged. There was no break in the chain of evidence that could have created a reasonable doubt as to the identity of the drug exhibits.
- B

- C [42] Thus, for the reasons given in *Hasbala's* case we do not think it can be said that it is in conflict with *Zaifull's* case. Each of the cases must be considered based on its peculiar facts and circumstances including the facts and events that formed the foundation for the admission in evidence of the drug exhibits. Indeed, the foregoing view expressed by the learned President reinforces our earlier opinion that the issue of identity of drugs exhibit is very much fact sensitive.
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Findings of this court

Identity of the drug exhibit

- E [43] Reverting to the present case it was the submission of learned counsel for the appellant that this case could be distinguished from *Hasbala's* case which did not have a break in the chain of evidence. The issues presented in this case involved not only the weight differences but also the periods when custody and care of the drug exhibit could not be accounted for.
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[44] We will deal first the issue of differences in the weight of the drug exhibit.

- G [45] In relation to the differences in the weight given, the respective relevant witnesses gave their versions of the event including the reasons for weighing the drug exhibit.

- H [46] SP9 made it clear that a bag together with the drug exhibit were given to him by SP7 for fingerprint tracing. Upon receipt he used an uncalibrated weighing machine to weigh the drug exhibit. He took the weight in relation to tracing for fingerprint. He learned from a course he attended that the weight of a thing could affect the result in determining fingerprint on it. Thus, the weight he obtained was immaterial in determining the offence the appellant would finally be charged with. Hence, there was actually no necessity for him to explain. Nevertheless his explanation on the weight issue could be inferred from the fact that he used uncalibrated weighing machine. Further, there was also no challenge that he received the drug exhibit from SP7.
- I

[47] As for SP7 he said that he received the drug exhibit from SP1. Again there was no serious challenge on this issue. SP7 weighed them merely to countercheck on the weight as given by SP1. He was not sure whether the weighing machine he used was calibrated. Being the investigating officer it would be necessary for SP7 to know the estimated weight of the drug seized by SP1 as the weight would assist him to determine the nature of the offence committed and the course to take in his investigation of the case.

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[48] The person who seized the drug exhibit and other items from the appellant was SP1. Before passing the same to SP7 he marked the items seized and he also weighed the drug exhibit, an exercise that was not necessary for him to do. As such the weight he obtained was also immaterial. Thus, there was no necessity for him to explain on the discrepancy between the weight he obtained and the weight obtained by SP3. Nevertheless, the use of uncalibrated weighing machine easily explained for the weight discrepancy.

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D

[49] There was no dispute that SP3, the chemist who analysed the seized drug used calibrated weighing machine to determine its weight.

[50] Thus, the obvious explanation for the discrepancies in the weight of the drug exhibit as obtained by SP1, SP7 and SP9 was due to their use of uncalibrated weighing machines as compared to the weight obtained by SP3 who used a calibrated weighing machine. And although their explanations might not have been necessary as stated earlier, nevertheless explanation was given or could easily be inferred from their testimonies unlike in *Zaifull's* case where no explanation was available, offered or could be inferred from the facts and circumstances available. In fact in the present case this weight issue was also considered by the learned trial judge and he ruled that there was no break in the chain of evidence thus rendering the weight issue immaterial in coming to his decision.

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[51] We are therefore of the view that plain reliance on *Zaifull's* case without more by learned counsel for the appellant was misconceived. Accordingly we find that the drug exhibit admitted in evidence in this case was the same as those seized by SP1 at KLIA. Indeed SP1 who marked the drug exhibit before passing it to SP7 testified and confirmed that it was the same drug exhibit that he seized at KLIA. This unchallenged confirmation by SP1 should be given due consideration in determining that there was no issue of doubt in the identity of the drug exhibit. Indeed in our view this is one of the facts and events that formed the foundation not only for the admission in evidence of the drug exhibit but also its reliability and trustworthiness as a piece of evidence.

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[52] As regards the gap periods (18–24 June 2008 and 24–26 June 2008) highlighted by learned counsel for the appellant we note that the learned trial

- A judge had considered and made a factual finding that there was no break in the chain of evidence. SP1 said that after marking the drug exhibit and other items seized from the appellant he handed the same to SP7 (the investigating officer) on 18 June 2008 at around 11–11.30pm. In turn SP7 said that he kept the drug exhibit inside a locked steel cabinet in his room. On 24 June 2008 he brought the exhibits for fingerprint tracing. He said that he kept watch on them while being dusted for fingerprint and after that he took them back with him. Then on 26 June 2008 at around 11.16am he gave the drug exhibit to SP3 for chemical analysis.

- C [53] It is therefore obvious that the drug exhibit was within the custody and care of SP7 during those dates. Anyway, there was no challenge by the defence during the trial that SP7 had left the drug exhibit outside his locked steel cabinet after taking them out for photographs and dusting for fingerprint. Such absence of challenge had deprived the prosecution the opportunity of rebuttal by way of police diaries and other relevant documents. To raise therefore the issue at the appeal stage in our view is a little late in the day.
- D

CONCLUSION

- E [54] With respect, we therefore find no reason to say that the courts below had misdirected themselves on the law in view of *Zaifull's* case.

- F [55] Accordingly we find no merit in this appeal and we dismiss it. The conviction and sentence imposed by the courts below are affirmed.

Appeal dismissed.

Reported by Kohila Nesan

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